

ENFORCEMENT OF COPYRIGHTS OVER THE INTERNET: A REVIEW OF THE RECENT ECJ CASE LAW

By Péter Mezei and István Harkai

The European Economic Community (EEC) was originally founded with the aim of fostering cooperation between Member States and harmonizing their laws across economic and political sectors. The necessary legislation at EEC level required the delegation of competences to the EEC, under the *Treaty establishing the European Economic Community* (TEEC or more commonly known as the *Treaty of Rome*). However, no such provision regarding the harmonization of intellectual property law was included in the original TEEC. Regardless, this has not hindered the development of the law in this area. The articles of the TEEC on the free movement of persons, services and capital, the prohibition on discrimination or

the ban on export/import customs, limitations and other equivalent measures, as well as the right of establishment¹ have all served as the foundation for harmonization in this field.²

The historical development of copyright law within the European Union can be separated into two distinct periods. The first being the European Court of Justice's (ECJ) jurisprudence, prior to 1991, and the second being the copyright directives that were adopted by the Council and the Parliament of the EEC since 1991. The ECJ case law largely focused on specific doctrinal questions,

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such as the exhaustion of the distribution right³ and it did not directly address the enforcement of copyright. Enforcement rules were inserted into EU copyright law only *via* directives. The first relevant rule was included in the *Software-Directive*.⁴

In the 1990s, the European Union also actively participated in the negotiations of three significant international treaties, namely the *TRIPS Agreement*, the *WIPO Copyright Treaty (WCT)* and the *WIPO Phonograms and Performances Treaty (WPPT)*. The negotiators of the *WCT/WPPT* and the *TRIPS Agreement* had two key ambitions. Firstly, the international harmonization of several issues was necessary, for example: the protection of computer programs and databases;⁵ the clarification of economic rights relating to Internet uses;⁶ the broadening of the scope of the three-step test to more/all limitations and exceptions;⁷ and the protection of digital rights management (DRM).⁸ Secondly, delegates understood that these new substantive norms, as well as pre-existing norms, would become obsolete without any effective law enforcement regulation. This was particularly true with respect to the rapidly growing information superhighway.

The *TRIPS Agreement* 1994 included a significant amount of hard law enforcement provisions, including provisional measures,⁹ civil and administrative procedures and remedies. These cover the rules on evidence, injunctions, damages, along with other remedies, the right to information and indemnification of the defendant.¹⁰ Member States should guarantee that all procedures are effective and allow for expeditious remedies. Member States should not impose barriers to effective trade and should be fair and equitable, but these procedures should not be unnecessarily complicated and costly.¹¹ The *WCT/WPPT* 1996 also obliged signatories to introduce necessary measures to implement the rules of the *WCT/WPPT*.¹² It requested that Member States ensure that the available enforcement procedures are effective and that remedies expeditiously prevent infringements and deter further infringements.¹³ These norms have directly influenced the *InfoSoc Directive* 2001¹⁴ and that of the *Enforcement Directive* 2004.

Following the adoption of these directives, momentous change has occurred in copyright law.

Firstly, the amount of online copyright infringements has grown exponentially to an unforeseen level. This is clearly evidenced by facts such as the ease of infringement and circumvention of technological protection measures; the requirement of “reciprocity,” that is, the obligation of sharing between end users; the alleged lack of legitimacy of the copyright norms; and the illegal profitability and supply-demand mismatch.¹⁵ In sum, a substantial gap exists between copyright norms and social realities. Indeed, “[a]ny attempt to legislate in opposition to current social norms is highly hazardous, especially since failure to achieve legal compliance undermines public confidence in the legal system.”¹⁶

Secondly, the borderless nature of the Internet has led to challenges regarding the cross-border enforcement of copyrights.

Thirdly, in the last decade the ECJ was very active in its decisionmaking. Much has been written on the activism of the Court of Justice.¹⁷ This is similarly the case in the field of copyright law. Dozens of preliminary rulings were published by the ECJ, in which the forum interpreted the constantly growing number of directives and in several cases the ECJ adopted quite a reformatory approach. Are these existing EU copyright norms, that is, the *acquis communautaire*, effective enough to tackle online copyright infringements or, alternatively, should we take steps to amend the directives in order to properly respond to the current trends in copyright infringements?¹⁸

Trisha Meyer correctly noted that “when policy and stakeholder cooperation fail, litigation serves to restore order and cover harm done by infringements.”¹⁹ This article aims to collect and outline the most recent preliminary rulings of the ECJ;²⁰ that is, the “law-in-action” relating to online copyright infringements. The article focuses on four different topics: (1) the disclosure of personal data of Internet users; (2) filtering and Web site blocking; (3) damages related to copyright infringements; and (4) the international private law aspects of copyright law enforcement. All topics will be analyzed using the same framework. To begin the relevant *acquis communautaire* will be addressed. Second, the most recent rulings of the ECJ will be summarized. Third, the consequences of these rulings and their effect on the existing legislation will be considered.

Ultimately the conclusion is that amendments to the *acquis communautaire* are inevitable.

However, reaching consensus on what amendments to implement may prove more problematic and challenging than it was in 2001 and 2004, when the *InfoSoc* and *Enforcement Directives* were accepted. As part of this article's concluding remarks, we will briefly examine the recent developments in the Digital Single Market Strategy (DSMS) and law enforcement.

CASE LAW

DISCLOSURE OF PERSONAL DATA OF ONLINE COPYRIGHT INFRINGERS

Acquis Communautaire

In order to commit an online copyright infringement, end users have to connect to the Internet. In the process they inevitably leave some of their digital footprints in the system. For example, connecting to the Internet requires an Internet Protocol (IP) address that is a unique identifier assigned to each device connected to a TCP/IP network. Further, end users might need to subscribe to access Internet. Such a subscription necessitates that the Internet Service Provider (ISP) collects, uses and retains some of their personal data, especially their names and billing addresses. Moreover, all data relating to their communications are stored or retained ("logged") by the ISP, including their IP addresses.

During the mid-2000s, it became default practice for copyright holders to request ISPs to disclose the most important personal data of their clients who had allegedly committed online copyright infringements, most often *via* peer-to-peer (P2P) file-sharing sites. Nevertheless, the European Union has a detailed set of rules regarding the collection, retention, and disclosure of personal data by electronic commerce service providers and these norms pose some limitations on such enforcement practices.

The *Enforcement Directive* allows claimants to request courts to order service providers to disclose infringers' personal data, in particular their names and addresses.²¹ Additionally, in accordance with the provisions of the Telecoms Package, Member States are obliged to ensure that the "communications and the related traffic data by means of a public communications network and publicly available

electronic communications services" are kept confidential.²² This default rule might be broken "when such restriction constitutes a necessary, appropriate, and proportionate measure within a democratic society to safeguard national security (*i.e.*, State security), defense, public security, and the prevention, investigation, detection and prosecution of criminal offenses or of unauthorized use of the electronic communication system."²³ Both the *InfoSoc Directive* and the *Enforcement Directive* confirm that they apply without prejudice to the European norms on data protection and privacy.²⁴

The protection and enforcement of copyrights, as well as the protection of personal data are listed as fundamental rights in the European Union.²⁵ The judiciary shall therefore cautiously balance these rights, as well as the freedom to receive and impart information (and consequently the freedom of communication) and on the side of ISPs the freedom to conduct a business.²⁶ The need for such balance is indirectly confirmed by the Charter of Fundamental Rights. According to Article 52 on the principle of proportionality

[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The European Commission previously has warned of the potential clash between several fundamental rights in the online copyright environment. According to the Commission

the adoption of blocking measures *necessarily* implies a restriction of human rights (...) and therefore, it can only be imposed by law, subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society.²⁷

The ECJ has been tasked with balancing these fundamental rights of copyright law and privacy/personal data in three significant cases.²⁸

ECJ Case Law

In *Promusicae v. Telefónica* and *LSG v. Tele2*, the plaintiffs represented producers and publishers of musical and audiovisual recordings. The defendants, Telefónica and Tele2, respectively, provided Internet access services on a commercial scale. Their services were used by end users to infringe copyrights by using P2P file-sharing programs. As the plaintiffs aimed to sue the end users for copyright infringements, Promusicae and LSG requested the disclosure of the identities and physical addresses, as well as the IP addresses,²⁹ date and time of connection to the Internet of certain infringers.³⁰

Under Spanish Law 34/2002 on information society services and electronic commerce, the data sought by Promusicae is authorized only in a criminal investigation or for the purpose of safeguarding public security and national defense, but not in civil proceedings or as a preliminary measure for civil proceedings.³¹ Whereas, under Article 87b(3) of the Austrian Copyright Act, the provision of personal data in civil (copyright) cases is allowed.³² As intellectual property rights shall be effectively enforced, there seemed to be a tension between the separate fundamental rights and thus not surprisingly both the Commercial Court No. 5 of Madrid and the Austrian Supreme Court referred their cases to the ECJ.³³

In these preliminary rulings the ECJ decided that the *E-Commerce Directive*, the *InfoSoc Directive*, the *Enforcement Directive* and the *e-Privacy Directive* do not require³⁴ or preclude³⁵ Member States from inserting an obligation to reveal personal data in order to ensure effective protection of copyright in civil proceedings. This means that when a Member State, such as Spain, implemented the directives literally, the disclosure of personal data in civil proceedings is not allowed. ISPs shall, however, comply with court injunctions where the Member State, such as Austria, explicitly allows for the provision of personal data of end users as part of civil proceedings against alleged copyright infringers.

In *Bonnier*, the applicants were publishing companies who held exclusive rights to reproduce, publish, and distribute 27 audio books. These audio books were illegally disseminated to the public *via* File Transfer Protocol servers. The Plaintiffs, Promusicae and LSG, requested the provision of relevant personal data from the defendant ePhone under Article 53c of the Swedish Copyright Act.³⁶ The Swedish ISP

refused to comply with the request claiming that such disclosure would run against the *Data Retention Directive*.³⁷ The Swedish Supreme Court requested a preliminary ruling from the ECJ to clarify whether the *Data Retention Directive* could preclude the disclosure of personal data in civil cases. They also asked whether the defendant could effectively resist such a provision even if the directive was not implemented by Sweden and that neither *Promusicae* and LSG, nor the Swedish domestic laws referred to the *Data Retention Directive*.³⁸

The ECJ noted that “it follows from a combined reading of Article 11 and recital 12 of Directive 2006/24 that that directive constitutes a special and restricted set of rules, derogating from and replacing Directive 2002/58 general in scope and, in particular, Article 15(1) thereof.”³⁹ Nevertheless, the Swedish national law was found to serve different purposes from those covered by the *Data Retention Directive* and thus the latter did not apply to the Swedish Copyright Act. It is similarly irrelevant that Sweden missed its deadline to implement the directive into its national laws.⁴⁰

Consequently, the ECJ reaffirmed its former rulings, whereby Member States are not precluded from laying down an obligation to reveal personal data in order to ensure effective protection of copyright in civil proceedings, supposed that such a disclosure guarantees the proper balancing of fundamental rights.⁴¹ Such balance is guaranteed by the Swedish domestic rules as they allow for the provision of personal data of those end-users only where the plaintiff shows clear evidence that someone has committed an infringement and where the disclosure of information outweighs “the nuisance or other harm which the measure entails for the person affected by it or for some other conflicting interest.”⁴²

Discussion

The trio of rulings outlined above clarified that Member States might choose from two options when it is about the disclosure of personal data in civil proceedings. In the first scenario, the default rule is that personal data shall be provided in accordance with the EU directives. In these countries, such as Spain, the enforcement of copyrights can practically be excluded, because the relevant directives do not list copyright or civil matters in general among the reasons for disclosure. Yet, under the second scenario,

the domestic rules might require that personal data be revealed in civil proceedings. In this case, the protection of personal data and the protection and enforcement of intellectual property rights shall be treated as equally important fundamental rights. Both can be limited in order to effectuate the other. It is the Member States' obligation to introduce a balanced regulation where the functioning of the two distinct interests is guaranteed. The Swedish solution is one such example of a balanced system. It respects and guarantees the confidentiality of personal data, however, it allows for data to be revealed in certain circumstances, where the end user is convincingly charged of committing illegal acts.

The vast majority of Member States follow the first option. Consequently, the disclosure of personal data of individuals accused of infringing copyrights did not gain traction as a traditional and typical form of law enforcement.⁴³ Not surprisingly, copyright holders looked for another strategy to repress online piracy. They understood that the most effective way to tackle infringements could be to “grab the bottle at the neck,” that is, to focus on intermediaries. Unlike individual infringers, their number is limited, they are geographically reachable, they are in better financial conditions, they have all the capabilities to prevent these infringements, and they are also strictly focusing on their reputation. Therefore, since 2010, right holders have taken steps against intermediaries in order to prevent copyright infringements.

FILTERING AND WEB SITE BLOCKING

Acquis Communautaire

The responsibility and liability of intermediaries is regulated by the European Union in a complex, multidimensional way.⁴⁴ First, electronic commerce is regulated in a dedicated directive.⁴⁵ This directive includes “a scale of responsibility: liability increases proportionally with the editorial role of service providers.”⁴⁶ According to it, safe harbor provisions exist for the benefit of mere conduit,⁴⁷ caching,⁴⁸ and hosting service providers.⁴⁹ These intermediaries are not liable for the copyright infringements committed *via* or with their systems, supposed they are unaware of the infringing activity and/or they act expeditiously to remove or make unavailable the infringing materials *via* their systems.

The liability of these intermediaries “increases proportionally with the editorial role of service providers.”⁵⁰ For example, mere conduit service providers have the smallest available information on the contents transferred *via* their system and so their liability remains quite small. Whereas, hosting service providers have the strongest ability to oversee the use of their platforms and accordingly they should operate with caution.

As a significant addendum, the *E-Commerce Directive* prohibits Member States from imposing a general obligation to “monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.”⁵¹ This prohibition of general monitoring is applicable for all e-commerce service providers. The main purpose of the immunity envisaged by the directive is to guarantee the proper functioning and constant development of the Internet and the related service providers. According to the European Commission, “online platform companies” had a market capitalization of USD 3.9 trillion.⁵²

The safe harbor provisions do not mean, however, that intermediaries are fully exempt from safeguarding the effective functioning of IP rights. As intermediaries have the closest relationship with the infringers they are best placed to bring those infringements to an end.⁵³ Therefore, they should be subject to injunctions under Article 8(3) of the *InfoSoc Directive* and Article 11 of the *Enforcement Directive*. Such injunctions also are available as provisional or precautionary measures to prevent any copyright infringements.⁵⁴ In sum, the *acquis communautaire* allows right holders to issue injunctions to those intermediaries that contribute actively or passively to copyright infringements both before and after trial.

Nevertheless, the balancing of these norms is not an easy task. First, the *Enforcement Directive* expressly notes that it leaves the rules of the *E-Commerce Directive* intact.⁵⁵ Second, intermediaries are going to be more and more active in running their businesses. They are turning from passive to active content providers and their knowledge on the use of their systems is far less questionable than it once was. Third, the protection and effective enforcement of copyrights is equally confirmed by Recital 45, as well as Articles 12(3), 13(2), 14(3), and 18(1) of the *E-Commerce Directive*. The tension between and the difficult application of these two directives is exemplified by recent ECJ case law.⁵⁶

ECJ Case Law

In the first two cases that will be considered herein, a Belgian collective society, SABAM, sued an ISP (Scarlet Extended, originally Tiscali) and a social networking site (Netlog) for not complying with the plaintiff's request to filter out infringing materials transmitted over and hosted in their systems. Both defendants tried to rely on the safe harbor provisions of the *E-Commerce Directive*.

In *Scarlet Extended*, the clients of the defendant's Internet service used unauthorized P2P file-sharing applications to download musical works that belonged to SABAM. SABAM claimed that Scarlet Extended was the best placed to take measures to bring the copyright infringements to an end by blocking or making it impossible for the customers to send or receive files.⁵⁷ Scarlet argued from the beginning that SABAM's demand to filter out infringing materials was not an effective solution, because there were numerous technological obstacles and several more straightforward alternatives available to countenance these infringements.⁵⁸ Further, Scarlet Extended noted that Article 15 of the *E-Commerce Directive* prohibits the imposition of general monitoring obligations on service providers. The ECJ agreed with Scarlet Extended that SABAM's filtering requirement was too broad. The Court of Justice concluded that the *acquis communautaire* precluded

an injunction made against an internet service provider which requires it to install a system for filtering all electronic communications passing *via* its services, in particular those involving the use of peer-to-peer software; which applies indiscriminately to all its customers; as a preventive measure; exclusively at its expense; and for an unlimited period, which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual-property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.⁵⁹

Shortly after the publication of *Scarlet Extended*, the ECJ concluded that a similarly broad request for an injunction by SABAM against a hosting service

provider was precluded by the EU directives. By way of a brief background, Netlog users could build virtual communities and publish video clips on their profile pages. Such postings occurred without the authorization of SABAM and without any payment to them. As Netlog was unwilling to pay for its clients' postings, SABAM requested the Brussels Court of First Instance order Netlog to filter out the infringing materials from its system. Netlog argued that EU law prohibits imposing any general monitoring obligations on hosting service providers.⁶⁰

The ECJ recognized that SABAM could only ask for an injunction against intermediaries under Article 8(3) of the *InfoSoc Directive* and Article 11 of the *Enforcement Directive*, if the injunction complied with the safe harbor doctrine detailed within Article 15(1) of the *E-commerce Directive*. In fact, SABAM's request for a general filtering mechanism ran against Article 3 of the *Enforcement Directive*, whereby all enforcement measures must be fair and proportionate and must not be excessively costly.⁶¹

The ECJ has further stressed that IP rights deserve protection under Article 17(2) of the *Charter of Fundamental Rights of the European Union*. At the same time, IP rights are not absolute and their exercise should be subject to the effective functioning of other fundamental rights,⁶² including the freedom to conduct a business, the protection of personal data and the freedom to receive information. Consequently, the ECJ stressed in both preliminary rulings that striking a balance of the different fundamental rights is a priority of EU law.⁶³ The ECJ concluded in both cases that SABAM's filtering injunctions would endanger the operation of these fundamental rights.⁶⁴ This conclusion means that copyright law does not work as *primus inter pares*. It is only one of the many important fundamental rights that should be guaranteed by EU law, but that protection should never extend so far as to impede other rights.

Following the failure to force conduit and hosting service providers generally to filter out infringing materials from their systems, right holders adopted a different approach to targeting these providers. They requested ISPs to block access to specific infringing Web sites.

In *Telekabel*, two motion pictures producers, Constantin Film and Wega, requested an Austrian ISP to block access to Kino.to, a German pirate streaming website. UPC Telekabel Wien resisted

complying with the order, in particular referring to Article 8(3) of the *InfoSoc Directive*. They claimed that they had no business contact with the infringing website; that it could not be proved that its customers committed any copyright infringements; that various blocking measures could technically be circumvented; and that these measures were rather expensive.⁶⁵ Upon the request of the Austrian Supreme Court, the ECJ had to decide whether UPC Telekabel Wien could be classified as an intermediary as outlined in Article 8(3) of the *InfoSoc Directive*. Further, the ECJ was required to answer whether it was acceptable to require a mere conduit service provider to take specific measures to make it more difficult to access a website containing unlawful contents, if those measures are expensive and can easily be circumvented without any special technical knowledge.⁶⁶

The ECJ noted that under Article 8(3) of the *InfoSoc Directive* the term “intermediary” covers “any person who carries a third party’s infringement of a protected work or other subject-matter in a network.”⁶⁷ Consequently, no contractual relationship between UPC Telekabel Wien and Kino.to was necessary to categorize the ISP as an intermediary.⁶⁸ Thus, the ISP could be subject to injunctions under the *InfoSoc Directive*, if the plaintiff could prove that any end user accessed the infringing materials *via* the ISP’s system.⁶⁹

The ECJ reaffirmed that striking a fair balance between the several, often competing, fundamental rights is necessary whenever a court considers ordering an injunction against an intermediary.⁷⁰ In *Telekabel*, the freedom of information, the freedom to conduct a business and the protection of intellectual property rights were all at stake.⁷¹ The Court of Justice confirmed that end-users shall be granted the chance to protect their fundamental rights.⁷² Further, unlike in the two SABAM cases, the ECJ found that the film producers’ request to force an ISP to reach a given result (*Erfolgsverbot*) represented a balanced approach. More precisely, the ECJ concluded that

the fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the

rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.⁷³

More recently, in *McFadden*, the ECJ had to decide whether a provider of an open Wi-Fi hotspot could be considered an intermediary under Article 12(1) of the *E-Commerce Directive*, and if so, could it be liable for copyright infringements carried out by the users of the wireless network?⁷⁴ The ECJ provided an affirmative response to both aspects. First, the Court of Justice noted that *McFadden* provided his service as a communication network operator and made that network available to the members of the general public free of charge. This led the ECJ to conclude that *McFadden*’s service was an information society service.⁷⁵ The ECJ further noted that the access was provided by *McFadden* as a technical, automatic and passive process, serving the transmission of the required information. Aside from these grounds, no further conditions needed to be satisfied in order for someone to be deemed a mere conduit service provider.⁷⁶ Consequently, *McFadden* could be ordered to protect his Wi-Fi hotspot, in order to prevent copyright infringements.⁷⁷ In doing so, the provider could freely choose the applicable technical measures to fulfill the requirements of the injunction. The ECJ noted that password-protection is one such example of an acceptable, balanced and proportional solution.⁷⁸

Discussion

The ECJ case law confirmed that ISPs are subject to injunctions, irrespective of their immunity under

the *E-Commerce Directive*. Nevertheless, as the age old adage goes the devil is in the detail. First, the two *Sabam* rulings made it clear that no general obligations could be imposed against them. However, these preliminary rulings did not address where the dividing line between blanket blocking injunctions and strictly targeted, result tailored or specific obligations lies. In these decisions, it is hard to analyze which elements of the failed requests of SABAM should be prioritized and which are unsupportable. Nevertheless, the rulings left open the possibility of imposing narrow/specific or strictly targeted obligations on ISPs. This was later affirmed in *Telekabel*.⁷⁹ There, the ECJ found that an injunction with a reasonably limited scope is capable of striking a fair balance between the differing fundamental rights.

Second, irrespective of the evolving ECJ case law, the application of the *acquis communautaire* in the Member States shows stark contrasts.⁸⁰ Filtering and blocking injunctions were issued by courts in many countries within the European Union.⁸¹ These systems efficiently tackled unlawful practices in Portugal and the United Kingdom. This discussion begins by introducing the English jurisprudence.

In *Newzbin*, the High Court ruled that Newzbin was jointly and severally liable for the unlawful downloading of illegal contents by the end-users through the indexing portal ran by Newzbin. This was because the operators of the site knew about the large scale infringements, yet chose to do nothing to bring these infringements to an end.⁸² Following this litigation, Newzbin declared bankruptcy and ceased trading. Right holders reacted to the appearance of Newzbin2 with a request for an injunction against British Telecom. In *Twentieth C v. British Telecommunication* the High Court issued an injunction against British Telecom based on the fact that its network was used by infringers and it had actual knowledge of these infringements after the right holders reported them to it.⁸³ The High Court confirmed the compatibility of such an injunction with Articles 12 and 15(1) of the *E-Commerce Directive*.⁸⁴ Shortly thereafter, in *Dramatico v. Sky*, the right holders aimed to block access to the notorious site known as 'The Pirate Bay'. In order to achieve this, they sued several ISPs at the same time. The High Court ruled in favor of the applicants and ordered the defendants to block access to 'The Pirate Bay' as the infringements were carried out through their networks and they had knowledge of the wrongful acts.⁸⁵

The blocking of 'The Pirate Bay' can be deemed a modest success. Right holders developed their strategy and sued several ISPs at the same time and requested the simultaneous blocking of numerous infringing Web sites. In *EMI v. Sky*, the High Court ordered the blocking of access to KAT, H3T and Fenopy indexing sites.⁸⁶ Following the successful fight against P2P service providers, English right holders opened new fronts against sports streaming sites⁸⁷ and several other video streaming sites.⁸⁸

This brief examination of British case law confirms the validity of blocking injunctions, at least on a national level. The proportionality of injunctions is evidenced by the fact that ISPs did not oppose the measures and they considered the implementation costs to be modest.⁸⁹ The effectiveness of the blocking injunctions also can be demonstrated by the fact that when the majority of telecommunication companies were targeted at the same time and were ordered to comply with the injunction for a longer period of time legal streaming services saw immediate spikes in demand. For example, in 2013 the number of consumers who visited paid streaming sites increased by 12 percent following a series of injunctions⁹⁰ and closing MegaUpload raised the market share of digital movie stores by 6-8 percent.⁹¹

If we now turn our attention away from the UK example and towards the second country cited Portugal we can see similar results. The efficacy of blocking practices in Portugal, another Member State of the European Union, is evidenced by INCOPRO's survey. According to this survey, the blockade of 65 out of the top 250 unauthorized sites led to the decrease of their usage in Portugal by 56.6 percent over the period of September 2015 to October 2016, whilst comparatively the usage of these sites increased by 3.9 percent globally.⁹²

McFadden is another milestone in the history of copyright enforcement within the European Union. The ECJ held that an individual could be an access service provider and at the same time it used the concept of indirect liability against the operator of a Wi-Fi hotspot. However, the reformatory use of indirect liability has gained criticism, as well as the ECJ's opinion that declared password protection an effective measure. Further, the Court of Justice went beyond the boundaries of the safe harbor doctrine of Article 15 of the *E-Commerce Directive*, when it recognized Sony Music's rights to damages and costs.⁹³

The concept of indirect liability was further developed by the ECJ in its recent ruling in *Stichting Brein v. Ziggo*. In the original procedure the Dutch anti-piracy foundation, Stichting Brein, requested two ISPs, Ziggo and XS4ALL, block both the domain name and the IP address of the notorious ‘The Pirate Bay’. Irrespective of the other aspects of this ruling, what is arguably most important is the fact that the ECJ followed its earlier decisions⁹⁴ and concluded that ‘The Pirate Bay’ communicated the protected subject matter to the public by creating and maintaining a system for this purpose. The operators of ‘The Pirate Bay’ intervened with full knowledge of the consequences of their conduct to provide access to the protected works by indexing torrent files on their online sharing platform. Without such a platform the end users would be unable to locate and share the works. The end users formed a public, as they consisted of an indeterminate but large number of people. They also formed a new public, as they were not originally taken into account by the right holders when the initial communication of the works was authorized. The Pirate Bay’s liability was further supported by its unwillingness to react or respond to the notices it received from the right holders about the infringements, as well as the fact that it operated the website with the purpose of obtaining profit from advertisements.⁹⁵

This ruling is of significant importance for several reasons. First, it reaffirmed the concept of indirect liability developed by the ECJ in *McFadden*.⁹⁶ Practically speaking, website operators who are not using the protected subject matters directly, as all contents are downloaded, stored and made available by end users, are indirectly liable if their system is used by their clients to infringe copyrights. Consequently, these intermediaries can be targeted by right holders under Article 3(1) of the *InfoSoc Directive*, and can be forced to pay substantial damages to right holders, as well as being instructed to bring the infringements to an end.

Second, suing the Web site operators is still unfortunately not the most effective way of law enforcement. Most of these intermediaries offer their services from non-EU countries and thus jurisdictional problems might arise. Moving to another domain is also an easy option for Web site operators.

Third, the indirect liability of system operators does not mean at all that Article 8(3) of the *InfoSoc Directive* and Article 11 of the *Enforcement Directive* have become useless. The most effective

way of reducing the harm caused by online copyright infringements remains to order an ISP to block access to or filter the infringing materials from their systems. Practice will show, whether ISPs or system operators are going to be the real ‘police officers’ of online copyright infringements.

CALCULATION OF DAMAGES FOR ONLINE COPYRIGHT INFRINGEMENTS

Acquis Communautaire

European countries traditionally allow for the recovery of actual damages for copyright infringements. This is equally true for online copyright infringements. The European Union also has harmonized such an approach in the *Enforcement Directive*. According to it

Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement, or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.⁹⁷

The first sentence of Article 13(1) looks crystal clear. However, as Article 13(1)(b) allows for

setting the damages as a lump sum, the *Enforcement Directive* inevitably opened the doors for a debate over the appropriate limits on such a sum. Is double or triple the amount of hypothetical royalties calculated under the statute still an appropriate remedy or is it already punitive damages and, at the same time, an abuse of rights under Article 3(2) of the *Enforcement Directive*? The ECJ faced these questions in *OTK v. SFP*.

ECJ Case Law

SFP is a Polish collective society that manages copyrights in audiovisual works. OTK broadcasted television programs *via* cable network in a Polish town, Oława. Following the termination of the contract between SFP and OTK, the latter continued to communicate copyrighted works to the public and asked the Copyright Commission of Poland to establish a new rate of fee for the use. OTK duly paid the newly established fee to SFP, however, SFP disagreed with the calculation. SFP brought an action against OTK in order to prohibit the retransmission of the protected audiovisual works until a new agreement could be concluded by OTK and SFP. Furthermore, SFP asked for damages for the unauthorized use. The Polish Supreme Court was uncertain about the application of Article 13 of the *Enforcement Directive* and so it referred the case to the ECJ. The ECJ was tasked with deciding whether right holders could seek redress for their damages on the basis of general principles, or whether they could request the payment of a lump sum corresponding to twice the amount of the license fee, or, in the event of a culpable infringement, three times the amount of the license fee. The Court of Justice was further requested to decide whether a double amount of damages should be treated as punitive damages.⁹⁸

The ECJ recalled that recital 3 and Article 3(2) of the *Enforcement Directive* requires the procedures and remedies provided by Member States to be effective, proportionate, and dissuasive.⁹⁹ The ECJ also noted that a double damages clause does not necessarily run against the *Enforcement Directive*. Admittedly, recital 26 of the *Enforcement Directive* has stressed that it was not the aim to introduce an obligation for punitive damages, but “to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.” The ECJ

reasoned that this position of the EU legislation could not be interpreted as prohibiting Member States from introducing punitive damages. Nevertheless, the Court of Justice found it unnecessary to discuss whether punitive damages were in compliance with Article 13 of the *Enforcement Directive*, as the Polish domestic rules did not introduce such a system.¹⁰⁰

The ECJ decided that the mere payment of a hypothetical royalty is not capable of guaranteeing the compensation of the actual losses. Such compensation would not ensure the reimbursement of the costs linked to researching and identifying possible acts of infringement, the compensation for possible moral prejudice or the payment of interest on the sums due. Indeed, the plaintiff convincingly evidenced at the hearing that the double amount of hypothetical royalty objectively reflected its losses, including costs related to law enforcement.¹⁰¹

In sum, the ECJ found that Article 13 of the *Enforcement Directive* allows right holders to seek redress for their actual damages or, without having to prove the actual loss, for twice the license fee which would have been due under the contract with the collecting society.¹⁰²

Discussion

Some have argued that the ECJ has opened the doors for punitive damages through *obiter dicta*.¹⁰³ Admittedly, the ECJ has noted that Member States are not precluded from introducing more protective measures and that EU law cannot be interpreted as precluding Member States from introducing punitive damages.¹⁰⁴ We, however, disagree with such an opinion. Recital 26 did not expressly prohibit the regulation of punitive damages by Member States, but only reflected the European legislature’s unwillingness to do so. The ratio of that recital is that the compensation scheme in EU copyright law is an objective one that focuses mainly on the actual losses of the right holder. At the same time, the right holder is entitled to the compensation of identification and research costs relating to the infringement. Moreover, in cases where actual damages would be hard to calculate, right holders are entitled to ask for a lump sum. Such a lump sum should, however, remain reasonable and should comply with the losses incurred due to the infringement. If that is the case, the requested compensation has no punitive nature. *Vice versa*, if the requested damages would not reflect

the actual losses and expenses of the right holder, the right holder's claim would represent an abuse of rights under Article 3(2) of the *Enforcement Directive*.

There is no way of introducing punitive damages by Member States, if this interpretation is correct. *Per definitionem*, punitive damages must be more than actual damages plus costs of enforcement. A portion of punitive damages must aim to punish and repress infringers, but that seems incompatible with recital 26 and Articles 3(2) and 13(1) of the *Enforcement Directive*.

ONLINE COPYRIGHT INFRINGEMENTS AND INTERNATIONAL PRIVATE LAW

Acquis Communautaire

Suing someone for copyright infringements is not only an issue of substantive law, but also one of procedural law. Indeed, infringements having an international character require right holders to correctly identify the most appropriate forum for proceedings. This is especially true for online copyright infringements. This is where the norms of international private law on jurisdiction come into play.

The *Brussels I Regulation*¹⁰⁵ allows for significant flexibility for the benefit of plaintiffs in selecting the forum. As a general rule, Article 2(1) declares that “[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.” This general rule is supplanted by special, exceptional norms. Article 3 allows for the suing of infringers in the courts of Member States other than the infringers’ domicile. Most importantly, infringers can be sued “in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”¹⁰⁶ Further, under Article 6(1), any court might try more infringements at the same time, if it has jurisdiction over at least one of those infringements.

Consequently, EU law presents plaintiffs, who will most probably be copyright holders, with a certain degree of flexibility to sue infringers at least in front of courts of two different Member States. It is a practical and tactical question as to which forum should be selected by the plaintiff, because each forum will have different procedures, timescales, rules and varying degrees of awardable damages.

ECJ Case Law

In the first case to be discussed, Mr. Pinckney brought an action against Mediatech before the Regional Court of Toulouse after he discovered that his 12 songs had been illegally reproduced on CDs in Austria. Later, the CDs were marketed and sold online without authorization by British corporations. Mediatech, seated in Austria, challenged the jurisdiction of the French court and claimed that only Austrian courts had jurisdiction to hear the case. The ECJ had to decide whether Article 5(3) of the *Brussels I Regulation* allowed right holders to sue anywhere, where the content was made available *via* the Internet, or whether it also required that the content be directed to the public of that specific country where jurisdiction was sought.¹⁰⁷

The ECJ noted that Article 5(3) speaks of a rule on special jurisdiction, which must be interpreted restrictively. The Court of Justice confirmed that the phrase “place where the harmful event occurred or may occur” intended to cover both the place where the damages occurred and the place of the event giving rise to it and thus it allows the plaintiff to bring an action in all relevant places.¹⁰⁸ Hence, the court of the place where the alleged infringer has his place of domicile would be the most appropriate place to bring an action, in order to have all the damages endorsed.¹⁰⁹ Nevertheless, the applicant can sue before the court of any Member State in which the protected subject matter has been accessible *via* the Internet. Such courts have jurisdiction only to determine the damages caused in the Member State within which it is situated.¹¹⁰ If, however, the court selected has jurisdiction over the damages caused in other Member States [e.g., under Article 6(1) of the *Brussels I Regulation*],¹¹¹ it can replace those courts in ascertaining whether copyrights have been infringed, in assessing the amount of damages and in determining the nature of the harm caused.¹¹²

More recently, in *Hejduk*, the ECJ faced again the question as to whether the making available of a protected subject matter (photographs) for viewing on and downloading from a German Web site also leads to the jurisdiction of courts in other Member States (namely, in Austria) where the Web site was accessible.¹¹³ In *Pinckney*, the ECJ already concluded that the sole condition of the application of Article 5(3) is that a harmful event has occurred or may occur in a Member State and the *Brussels I Regulation*

does not require that the activity is directed to the Member State in which the court seized is situated.¹¹⁴ Consequently, the defendant can be sued depending on the will of the applicant.¹¹⁵

In *Hejduk*, the Court of Justice recalled that copyrights are protected under the *InfoSoc Directive* automatically and, at the same time, on a territorial basis. This means that the infringements of these rights should be adjudicated in accordance with the domestic copyright rules.¹¹⁶ It must be taken into account that the use of the protected photographs occurred, when they were displayed and made accessible for downloading on EnergieAgentur's Web site. As the company has placed the photographs on its Web site, such an act of making available to the public, that is, the event giving rise to a possible infringement, happened at the place where EnergieAgentur has its seat.¹¹⁷

The Court of Justice also found it irrelevant that the defendant's domain name was registered in Germany, because the damages occurred or might occur in the country where the photographs were accessible.¹¹⁸

Finally, the ECJ reaffirmed that under Article 5(3) of the *Brussels I Regulation* the court seized has jurisdiction only over those damages that occurred or might occur on its soil.¹¹⁹

Discussion

The *Brussels I Regulation* includes bright-line rules and ECJ case law has sought to clarify these rules. This system can be summarized with two keywords: (1) flexibility and (2) convenience. Flexible, as the plaintiff has total freedom to choose from at least two different jurisdictions when suing the infringer. Under the general rules, the court of the defendant's domicile has jurisdiction and it can rule on all damages occurred. Under Article 5(3) the plaintiff can bring an action wherever damages occurred or may occur, including his own town, if that looks the best option for him. However, this court can only rule on the damages that occurred or may occur within that country. The word convenient was selected, because the plaintiff might select the forum depending upon on their own needs or preferences. If that looks easier (as in *Pinckney*), he does not even need to leave his own town. If, however, total coverage of damages is sought, the plaintiff must initiate the proceedings in the defendant's country, except where another, more

convenient forum has jurisdiction under Article 6(1) of the *Brussels I Regulation*.

Nevertheless, the ultimate decision, where and for what to sue is more complex than simply selecting the forum. The selection must be cautiously taken in light of an eclectic plethora of tactical factors, some of which were alluded to before, such as the nuances of the civil procedural rules, including but not limited to the length and costs of the trials, the amount and the method of payment of attorneys' fees (including the recovery of the fees by the losing party), and the calculation of damages (including whether punitive damages are available or not).¹²⁰

FUTURE ASPECTS OF COPYRIGHT ENFORCEMENT IN THE EUROPEAN UNION

In the last decade or so, the activism of the ECJ has grown significantly in copyright law. The Court of Justice has been called on to provide preliminary rulings on various cases, during which it has had to provide interpretations on almost every single EU copyright directive. A notable amount of these cases centered on the digital economy. This article focused solely on those that were directly related to the enforcement of copyrights. The number of unresolved issues did not decrease after these rulings were published. Indeed, technological developments and the growing number of new service models have led to the constant appearance of novel copyright disputes.

To recap, this article categorized the case law on copyright enforcement into four distinct groups. Among them, the international private law aspects of copyright enforcement are both regulated and applied clearly and logically. Further, although the applicability of punitive damages is not prohibited by EU legislation or the judiciary, we believe that this form of sanctioning has no place within EU copyright law.

The two remaining groups make it necessary to reconsider certain parts of the existing normative structure of the European Union.

First, the parallel norms of copyright law and data protection were hardly reconcilable. Data protection of end users trumped the interests of copyright holders for a long time. Importantly, the European Parliament and the Council attempted to put an end to this dispute, when they adopted the *General Data Protection*

Regulation (GDPR) in 2016.¹²¹ Under Article 23(1)(j) of the GDPR the obligations and rights of data controllers or processors may be restricted in order to safeguard the enforcement of civil law claims. In fact, the new GDPR codifies the opinion of the minority of Member States and replaces Article 13(1) of the current directive. Since regulations are directly applicable in all Member States, the GDPR makes it obligatory for Member States to regulate the disclosure of personal data of end users who infringe copyrights. In sum, the uncertainties surrounding law enforcement will be resolved and clarified after the GDPR comes into force on May 25, 2018.¹²²

Second, the efficacy of Web site blocking and/or filtering is still not generally evidenced. So far, the British experiences are positive, but no other EU country has been able to show any similar success based on these injunctions. For example, in the Netherlands, researchers have shown that blocking file-sharing platforms is relatively ineffective in the battle to reduce unauthorized file-sharing.¹²³ The efficiency of Web site blocking/filtering will therefore depend on several specific factors. Among them, the most important is the selection of the most appropriate technology. To explain, the blocking of IP addresses is not a good solution, as an IP address can be used by multiple Web sites at the same time. Blocking access to a given IP address would lead to over-blocking, which would prove an untenable position in light of the rules on proportionality. Christina Angelopoulos has noted correctly that “even mere blocking can have more extensive repercussions than intended: blocking entire websites, for example, risks collateral damage in the form of disallowing access to entirely legal content that happens to be hosted at the same address.”¹²⁴ By way of comparison, blocking at DNS-level is more targeted, but can still negatively affect the access to many lawful domains. Whereas, blocking at URL-level would allow for the most direct way of law enforcement. However, such a solution is unfortunately the most expensive one as right holders need to invest a significant amount of resources into locating the specific Web sites offering unlawful materials. Additionally, the reproduction of an infringing Web site under a new URL would effectively circumvent the blockade.¹²⁵

Not surprisingly, alternative solutions are sought to replace the complicated and sometimes controversial Web site blocking/filtering practices. One

particularly interesting idea is to request payment providers to restrict the access to the advertisement incomes of notorious service providers.¹²⁶ The follow-the-money approach started to gain ground in EU legislation as well.¹²⁷ Another solution is offered by the ECJ in *McFadden* and *Stichting Brein*. In both cases, although under different factual matrix's, the Court of Justice confirmed that service providers might be indirectly liable for the copyright infringements committed by their clients. If this interpretation prevails, at least Wi-Fi access providers and torrent indexing sites, functioning as search engines and hosting service providers, can be directly targeted by right holders under the concept of communication to the public. Consequently, there will be no need for injunctions or for the use of a notice-and-take-down procedure against them. Indeed, they will be directly subject to claims of damages.

Equally important, the European Commission already has taken significant steps towards modernizing the digital environment of the European Union. As part of that, the Commission aims to reform copyright law. The Commission stresses that the *status quo* of the liability regime was “designed at a time when online platforms did not have the characteristics and scale they have today.”¹²⁸ Without a doubt, the various types of online service providers have gained an unavoidable, central role in the dissemination of information, including copyrighted subject matter, over the Internet.

As a part of the DSMS, the EC properly noted that it is finally time to double-check the efficacy of the current harmonization of law enforcement rules. Indeed, some modifications are urgently needed to make this field of law up-to-date in the digital realm. The amendments must, however, keep the balance stressed above. As such, any reform in this field should not exaggerate the burden of e-commerce service providers. This is why the provisions on the so-called value gap deserve special attention.

The *Proposal for a Directive on Copyright in the Digital Single Market* aimed to oblige service providers that host large amounts of protected subject-matter and that play an active role by optimizing the presentation of the uploaded contents. It also encouraged them to cooperate with right holders either to ensure the functioning of agreements concluded with right holders or to prevent the availability of protected subject matter on their services. The measures to prevent infringements should be appropriate and

proportionate. Effective content recognition technologies, adequate reporting on the functioning and the deployment of the measures, as well as complaints and redress mechanisms, were explicitly declared by the European Commission as reasonable measures.¹²⁹

The new regime envisaged by the European Commission seemed to be incompatible with the existing EU e-commerce law. The European Commission rejected such criticism when it declared that the new obligation “should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.”¹³⁰ The Commission’s explanation was not fully convincing. Indeed, depending on the exact content of appropriate and proportionate measures to prevent infringements, it could easily collide with Article 15 of the *E-Commerce Directive* on the prohibition of general monitoring. As the ALAI’s resolution on the Commission’s proposal noted, “it will make it possible to prevent initial uploading of the content (*ex ante* blocking) following the provision of fingerprints enabling this to be done.”¹³¹ An effective *ex ante* blocking fits into the concept of general monitoring under the *E-Commerce Directive*.

Importantly, the European Parliament’s *Comodini Report* cut back the European Commission’s Proposal in several aspects.¹³² Amendment 21 and 23 replaced the reference to hosting service providers with those service providers who make available protected subject matter to the public, and whose service is not of a mere technical, automatic and passive nature. Amendment 22 deleted recital 38(2) from the proposal and thus complaints and redress mechanisms are erased from the current version of the proposal. Amendment 23 further erased the reference to Article 14 of the *E-Commerce Directive*. Amendments 56-61, in accordance with the above changes to recital 38, changed Article 13 significantly. For example, amendment 59 and 60 inserted the rights of users to communicate works to the public in accordance with the exceptions or limitations introduced by the *InfoSoc Directive* and to enforce these rights in front of courts. Furthermore, Amendment 61 replaced the reference to content recognition technologies with the more general term of “measures.”

In sum, the rules on law enforcement need to be updated to meet modern-day demands and balance the competing interests of right holders, society at large and service providers. However, as of

August 4, 2017, the European Commission had still not disclosed its detailed concept on modernizing the enforcement of intellectual property rights within the European Union. As soon as this much awaited proposal is published, a more thorough analysis of the DSMS and the *acquis communautaire* and case law on law enforcement will become possible. Nonetheless, we should cautiously listen to Andreas Rahmatian, who has convincingly argued that deeper harmonization might cause unnecessary troubles for the basic idea of the European Union.¹³³

NOTES

1. TEEC Title III, Art. 30–34, 36, and Art. 52, respectively.
2. On the legislative competences of the EU see Michel M. Walter and Silke von Lewinski, *European Copyright Law—A Commentary*, Oxford University Press, Oxford, 2010: p. 11-13, para. 1.0.16–1.0.19.
3. Péter Mezei, “Digital First Sale Doctrine Ante Portas—Exhaustion in the Online Environment,” *JIPITEC*, Issue 1/2015: p. 27-28.
4. Council Directive 91/250/EEC of May 14, 1991 on the legal protection of computer programs, Art. 7.
5. TRIPS Agreement Art. 10; WCT Arts. 4 and 5, respectively.
6. WCT Art. 8; WPPT Arts. 10 and 14.
7. TRIPS Agreement Art. 13; WCT Art. 10; WPPT Art. 16.
8. WCT Art. 11; WPPT Art. 18.
9. TRIPS Agreement Art. 50.
10. TRIPS Agreement Arts. 43–48, respectively.
11. TRIPS Agreement Art. 41(1)–(2).
12. WCT Art. 14(1); WPPT Art. 23(1).
13. WCT Art. 14(2); WPPT Art. 23(2).
14. Ana Ramalho, “Copyright Law-Making in the EU: What Lies Under the ‘International Market’ Mask?,” *Journal of Intellectual Property Law & Practice*, Issue 3/2014, p. 223.
15. Trisha Meyer, *The Politics of Online Copyright Enforcement in the EU—Access and Control*, Palgrave MacMillan, Cham, 2017, p. 61-62.
16. Måns Svensson and Stefan Larsson, “Intellectual Property Law Compliance in Europe: Illegal File Sharing and the Role of Social Norms,” *New Media & Society*, Issue 7/2012, p. 1149.
17. Lourenço Vilhena de Freitas, “The Judicial Activism of the European Court of Justice,” Luís Pereira Coutinho, Massimo La Torre, and Steven D. Smith (Ed.): *Judicial Activism—An Interdisciplinary Approach to the American and European Experiences*, Springer, Cham, 2015: p. 173-180.
18. The protection and exercise of copyrights in the offline world is equally important, especially those relating to the unlawful importation of goods from third countries. Compare to Martin Blomqvist v. Rolex SA and Manufacture des Montres Rolex SA, Case C-98/13, ECLI:EU:C:2014:55. These types of infringement are not addressed by the present article. The focus of the present article is solely on Internet-related issues.
19. Meyer, *supra* n.15 at 102.
20. Although the European Court of Human Rights has published several notable decisions relating to the enforcement of copyrights, those decisions fall outside of the scope of the present

- article. For a review of these decisions please see Christina Angelopoulos, "Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third party liability," *info*, Issue 6/2015, p. 81-85; Christophe Geiger and Elena Izyumenko, "The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking," *American University International Law Review*, Issue 1/2016, p. 49 et seq.
21. Directive 2004/48/EC on the Enforcement of Intellectual Property Rights, Arts. 8(1)(c) and 8(2)(a).
 22. Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, Art. 5. (Hereinafter referred to as e-Privacy Directive.)
 23. *Id.* Art. 15(1). See further Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art. 13(1).
 24. Compare to Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society Art. 9, and Enforcement Directive Art. 8(3)(e).
 25. Charter of Fundamental Rights of the European Union (2000/C 364/01), Arts. 17(2) and 8, respectively.
 26. *Id.* Arts. 11 and 16, respectively. As Christophe Geiger and Elena Izyumenko correctly noted there are three main perspectives of balancing: (1) the freedom of expression perspective, focusing on the fundamental rights of users; (2) the freedom to conduct a business perspective, focusing on the fundamental rights of businesses; and (3) a right to property perspective, focusing on the interests of copyright holders. See Geiger, *supra* n.20 at 43–115.
 27. European Commission, "Accompanying Document to the Proposal for a Council Framework Decision Amending Framework Decision 2002/475/JHA on Combating Terrorism: Impact Assessment ¶ 4.2," Council of Europe Commissioner, Working Paper, No. 14960/07, 2007.
 28. On the origins of balancing by the judiciary in the European Union see Angelopoulos, *supra* n.20 at 76–81.
 29. In *Scarlet Extended*, the ECJ declared that IP addresses are protected as personal data because they allow end users to be precisely identified. See *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, ECLI:EU:C:2011:771, para. 51. Later, in *Breyer*, the ECJ concluded that any information that directly or indirectly relates to an identified or identifiable natural person should be regarded as personal data. See *Patrick Breyer v. Bundesrepublik Deutschland*, Case C-582/14, ECLI:EU:C:2016:779, para. 32. A dynamic IP address is one such example of this type of information. See *Id.* para 48–49.
 30. On the facts of the cases see *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Case C-275/06, ECLI:EU:C:2008:54, para. 29–33; *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele 2 Telecommunication GmbH*, Case C-557/07, ECLI:EU:C:2009:107, para. 15–21.
 31. *Promusicae v. Telefónica*, para. 28.
 32. "Intermediaries within the meaning of Paragraph 81(1a) shall give the person whose rights have been infringed information as to the identity of the infringer (name and address) or the information necessary to identify the infringer, following an application in writing by the person whose rights have been infringed, such application to include sufficient reasons. The reasons given must include in particular sufficiently precise details as to the facts that give rise to a suspicion that there has been an infringement of rights. The person whose rights have been infringed shall pay the intermediary reasonable compensation for the costs incurred in the provision of that information." See *LSG v. Tele2*, para. 14.
 33. On the questions referred to the ECJ see *Promusicae v. Telefónica*, para. 34; *LSG v. Tele2*, para. 22.
 34. *Promusicae v. Telefónica*, para. 70.
 35. *LSG v. Tele2*, para. 47.
 36. *Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgroup AB, Piratförlaget AB, Storyside AB v. Perfect Communication Sweden AB*, Case C-461/10, ECLI:EU:C:2012:219, para. 19.
 37. Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
 38. On the facts of the case and the questions referred to the ECJ see *Bonnier v. Perfect Communications Sweden*, para. 25–35.
 39. *Id.* para. 43.
 40. *Id.* para. 44–46.
 41. *Id.* para. 55.
 42. *Id.* para. 19–20 and 58.
 43. Compare, however, to the newly introduced General Data Protection Regulation. See *infra* n.122 and the accompanying text.
 44. See in general, Eva Inés Obergfell and Alexander Thamer, "(Non-)Regulation of Online Platforms and Internet Intermediaries—The Facts: Context and Overview on State of Play," *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, Issue 3/2017, p. 202–203.
 45. 2000/31/EC Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
 46. Meyer, *supra* n.15 at 97.
 47. E-Commerce Directive Art. 12.
 48. *Id.* Art. 13.
 49. *Id.* Art. 14.
 50. Meyer, *supra* n.15 at 206.
 51. E-Commerce Directive Art. 15.
 52. Obergfell, *supra* n.44 at 201.
 53. InfoSoc Directive Recital 59.
 54. Enforcement Directive Art. 9(1)(a).
 55. *Id.* Art. 2(3).
 56. On the analysis of the ECJ case law see in general: Angelopoulos, *supra* n.20 at 74–76 and 88–90; Eleonora Rosati, "Intermediary IP injunctions in the EU and UK experiences: when less (harmonization) is more?," *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, Issue 3/2017, p. 207–210.
 57. *Scarlet Extended v. SABAM*, para. 15–20.
 58. *Id.* para. 24.
 59. *Id.* para. 55.
 60. *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, Case C-360/10, ECLI:EU:C:2012:85, para. 15–24.
 61. *Id.* para. 33–34.
 62. *Id.* para. 41.
 63. *Scarlet Extended v. SABAM*, para. 46; *SABAM v. Netlog*, para. 44.
 64. *Scarlet Extended v. SABAM*, para. 47–53; *SABAM v. Netlog*, para. 45–51. See further Meyer, *supra* n.15 at 102.
 65. *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, ECLI:EU:C:2014:192, para 15–16.
 66. *Id.* para. 17.
 67. *Id.* para. 30.
 68. *Id.* para. 34.

69. *Id.* para. 40.
70. *Id.* para. 45.
71. Charter of Fundamental Rights of the European Union, Art. 11, 16, and 17(2), respectively. See *UPC Telekabel Wien v. Constantin Film*, para. 47.
72. *Id.* para. 56–57.
73. *Id.* para. 64. Interestingly, the Advocate General opined to the contrary, arguing that the outcome prohibition does not comply with EU law, as it is not precise enough. Proportionality requires that the balance of fundamental rights must be guaranteed before the injunction is issued. See Opinion of Advocate General Cruz Villalón, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, ECLI:EU:C:2013:781, para. 88. See further Geiger, *supra* n.22 at 93–94.
74. On the facts and the procedural history of the case, as well as the questions referred to the ECJ see Tobias McFadden v. Sony Music Entertainment Germany GmbH, Case C-484/14, ECLI:EU:C:2016:689, para. 22–33.
75. *Id.* para. 43.
76. *Id.* para. 54.
77. *Id.* para. 79.
78. *Id.* para. 101. See further Federica Giovanella and Mélanie Dulong de Rosnay, “Case Comment: Community wireless networks, intermediary liability and the *McFadden CJEU* case,” *Communications Law*, 2017, p. 11-18.
79. Angelopoulos, *supra* n.20 at 88.
80. Geiger, *supra* n.20 at 47 and 61–64.
81. Meyer, *supra* n.15 at 103. On the British experiences see Althaf Marsoof, “The Blocking Injunction—A Critical Review of Its Implementation in the United Kingdom Within the Legal Framework of the European Union,” *IIC—International Review of Intellectual Property and Competition Law*, Issue 6/2015, p. 632-664; Rosati, *supra* n.56 at 210–212. On the Swedish experiences see Nedim Malovic, “Swedish Patent and Market Court of Appeal orders major ISP to block access to The Pirate Bay and Swefilmer,” *Journal of Intellectual Property Law & Practice*, Issue 5/2017, p. 368-370. On the Dutch experiences see Martin Husovec and Lisa van Dongen, “Website Blocking, Injunctions and Beyond: View on Harmonization from the Netherlands,” *Gewerblicher Rechtsschutz und Urheberrecht International Teil*, Issue 7/2017, p. 580-589; Andy, “BREIN Takes Down 231 Pirate Sites in Six Months, But That’s Not All,” *TorrentFreak*, July 22, 2017.
82. Twentieth Century Fox Film Corporation, Universal City Studios Production LLLP, Warner Bros. Entertainment Inc., Paramount Pictures Corporation, Disney Enterprises, Inc., Columbia Pictures Industries, Inc. v. Newzbin Limited, [2010] EWHC 608 (Ch) (March 29, 2010), para. 103 and 111-114.
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96. Christina Angelopoulos: “AG Szpunar in *Stichting Brein v. Ziggo*: An Indirect Harmonisation of Indirect Liability,” *Kluwer Copyright Blog*, March 23, 2017, <http://kluwercopyrightblog.com/2017/03/23/ag-szpunar-stichting-brein-v-ziggo-indirect-harmonisation-indirect-liability/>.
97. Enforcement Directive Art. 13(1). The international basis of this rule is TRIPS Agreement Art. 45.
98. On the facts and the procedural history of the case, as well as the questions referred to the ECJ see *Stowarzyszenie ‘Oławska Telewizja Kablowa’ v. Stowarzyszenie Filmowców Polskich*, Case C-367/15, ECLI:EU:C:2017:36, para. 11–17. As the Polish rules

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on triple damages were found to be unconstitutional by the Polish Constitutional Court shortly after the reference was submitted to the ECJ, that part of the question referred for a preliminary ruling has become hypothetical and, therefore, inadmissible. *Id.* para 19.

99. *Id.* para. 21.
100. *Id.* para. 27–29.
101. *Id.* para. 30.
102. *Id.* para. 33.
103. Miquel Montañá, “The CJEU decides that punitive damages are not contrary to Directive 2004/48,” *Kluwer Patent Blog*, February 6, 2017, <http://kluwerpatentblog.com/2017/02/06/the-cjeu-decides-that-punitive-damages-are-not-contrary-to-directive-200448/>.
104. OTK v. SFP, para. 23 and 27.
105. Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
106. Brussels I Regulation, Art. 5(3).
107. On the facts of the case and the questions raised see Peter Pinckney v. KDG Mediatech AG, Case C-170/12, ECLI:EU:C:2013:635, para. 9–15.
108. *Id.* para. 26.
109. *Id.* para. 36.
110. *Id.*
111. Compare to Eva-Maria Painer v. Standard Verlags GmbH and Others, Case C-145/10, ECLI:EU:C:2011:798, para. 80–83.
112. Pinckney v. Mediatech, para. 46.
113. On the facts of the case see Pez Hejduk v. EnergieAgentur.NRW GmbH, Case C-441/13, ECLI:EU:C:2015:28, para. 10–14.
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125. On the three separate options see Geiger, *supra* n.20 at 64–67.
126. Rosati, *supra* n.56.
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129. “Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market,” Brussels, 14.9.2016 COM(2016) 593 final, Article 13 and recital 38–39.
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